04-34 MAY 24 2004

No. 03- ____

In the Supreme Court of the United States

DARLA ELWOOD,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES COUNTY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Comm. Zakon violated Petitioner Darla Elwood's due process rights when he refused to recuse himself pursuant to CA Code of Civil Procedure Sec.170.1(a)(1) because he was both a party and a witness in a federal lawsuit involving a Los Angeles CSEA Action of a default child support order he entered against D. Elwood in the paternity action over which he is presiding. *Elwood, et al. v. Drescher, et al.*, Case No. CV 02-4656 LGB, DCCD, No. 02-56917, 9th Circuit.

2. Whether Commissioner Zakon has engaged in a pattern of constitutional misconduct resulting in denial of due process and equal protection to D. Elwood under the Fourteenth Amendment such that he should be disqualified from continuing as judge pro tem. in a proceeding where D. Elwood seeks custody of her children.

3. Whether Comm. Zakon violated D. Elwood's due process rights when he struck the Statement of Disqualification rather than refer it to a neutral judge and also filed an Answer.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Darla Elwood, ("D. Elwood"), Respondent Superior Court of the State of California for County of Los Angeles, Commissioner Robert Zakon, ("Comm. Zakon") assigned to Family Law Department of Los Angeles County Superior located at 900 Third St in San Fernando, California, and Joseph Morin, ("Morin") the petitioner in the lawsuit below, which is a Petition to Establish Parental Relationship, **Morin v. Elwood, Case No. PF 001184, Los Angeles County Superior Court.** D. Elwood and Morin are the parents of Jordan Elwood ("Jordan") whose date of birth is March 24, 1994, and Stephanie Elwood ("Stephanie") whose date of birth is September 29, 1995.

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Petitioner respectfully submits that a writ of certiorari should issue to review the California Second District Court of Appeal order in this case.

OPINIONS BELOW

The Court of Appeal Order denying Petitioner's Petition for Writ of Mandate in *Elwood v. Superior Court of the State of California for the County of Los Angeles, Case No. B169966* is reproduced in Appendix B at p. 2a-3a. The order of the California Supreme Court denying discretionary review in *Elwood v. Superior Court Los Angeles County, Case No.S119715* is reproduced in Appendix A at p. 1a. The order of Comm. Zakon striking the Statement of Disqualification and filing an Answer to the Statement in *Morin v. Elwood, Case No. PF 00-1184* is found at Appendix C at pp. 4a.- 9a.

STATEMENT OF JURISDICTION

The order of the Court of the Court of Appeal was entered on September 25, 2003. The order of the California Supreme Court denying discretionary review was entered on November 19, 2003. This petition is timely filed on February 17, 2004, which is ninety days from the entry of the order of the Supreme Court. See U. S. Supreme Court Rule 13.1; 28 U.S.C. Sec.2101(c). Jurisdiction of this Court is also based on 28 U.S.C. Sec.1257(a) based on the federal questions raised by D. Elwood in her Statement of Disqualification, Petition for Writ of Mandate, and Petition for Review, namely, her right to due process and equal protection under the Fourteenth Amendment.

D. Elwood stated in her Memorandum of Points and Authorities in Support of Statement of Disqualification at

pp.6-7 that "Respondent D. Elwood has a federal constitutional right to a fair, unbiased judge particularly under the circumstances of this case, and provided four pages of federal legal authorities in support of the claim. She also argued in her Memorandum of Points and Authorities in Support of Petition for Writ of Mandate to Second District Court of Appeal that "As already stated, D. Elwood has a federal and state constitutional right under the Due Process Clause of the Fourteenth Amendment and Code of Civ. Proced. Sec.170.1 to a judge who is not involved in the lawsuit as a party or witness him/herself." She included four pages of federal legal authorities on the federal due process claim at pp.12-16 of the Petition. Issue No. 2 in Petition for Review was

> Whether Commissioner Zakon has engaged in a pattern of constitutional misconduct resulting in denial of due process and equal protection to D. Elwood under the Fourteenth Amendment such that he should be disqualified from continuing as judge pro tem. in a proceeding where D. Elwood seeks custody of her children.

None of the Courts passed on the federal constitutional question. See Appendices A, B,C at pp.1a - 9a.

CONSTITUTIONAL CLAIMS AND STATUTE INVOLVED

The constitutional bases for the Petition are the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The statute involved is California Code of Civil Procedure Section 170.1. The text of the statute is set forth in Appendix D at p. 10a - 13a.

STATEMENT OF THE CASE

Morin filed his Petition to Establish Parental Relationship ("paternity action") on January 13, 1999, although on December 04, 1996, the County of Los Angeles obtained a default Judgment Establishing Parental Relationship in ***LA County v. Morin***, Case No. BY 183470, ("BY- case") Los Angeles Superior Court. On August 03, 1998, the County also obtained a Stipulation and Order for Morin to pay County $9,907.13 for welfare payments to D. Elwood for Stephanie and Jordan. Morin also filed two OSC's for child custody in the BY- case, one, on October 28, 1998, and the other, on November 24, 1998, but took them off calendar, and then filed the paternity action, ***Morin v. Elwood , supra, within days.***

Morin and D. Elwood filed OSC's for child custody and other relief. On April 20, 1999, the parties entered into a stipulated order for temporary joint legal and physical custody. Comm. Zakon had forced D. Elwood's attorney, along with Richard Kotler, attorney for Morin, into his chambers to decide the custody of the children, although D. Elwood had alleged that Morin had committed acts of domestic violence against her and her children (she had three other children), that their father had not seen the children in over two years and they barely knew him, and the parties' homes were over 30 miles apart.

On June 14, 1999, the Juvenile Court took jurisdiction alleging that D. Elwood had failed to protect her children by allowing her oldest child, a son, around them. ***In Re: Delaplane, in Re: Elwood***, Case No. CK 40405, Los Angeles Superior Court. Her son had been accused of molesting a first cousin. The charges against D. Elwood and her son were made just at the time she began dating which Morin did not

like and promised he would involve Child Protective Services to take the children from her as a punishment for dating a new man. The charges against D. Elwood and her son were dismissed by the Juvenile Court within six months of taking jurisdiction for lack of evidence. The Los Angeles County Sheriff closed the case, and the D. A. refused to prosecute.

D. Elwood never had an evidentiary hearing concerning loss or return of custody to her in Juvenile Court. D. Elwood repeatedly told the social workers of the domestic violence and stalking Morin had engaged in, including the fact that her friend who was helping her care for her children had obtained a two year civil harassment injunction against him for stalking both D. Elwood and her friend and for engaging in other acts, such as chasing them down the road, threatening them, breaking into the apartment where they lived, and carving a threat into the door of the apartment where they lived.

Morin has had primary custody since June 9, 1999, although, as already stated, neither Comm. Zakon nor the social workers considered the allegations that Morin had been physically and mentally abusive towards D. Elwood and her children when he lived with them. The Juvenile Court filed what is known as an exit order giving primary custody to Morin on October 2, 2001. D. Elwood is seeking to have the children returned to her, since in California a juvenile court order is not considered a judgment, and in Morin's paternity proceeding, there has never been a final judgment. Trial is set before Comm. Zakon for December, 2004. Thus, a parent accused of domestic violence obtained full custody of children he barely knew with no evidentiary hearing, not even a custody evaluation.

Unknown to D. Elwood while the children, D. Elwood, and Morin were in Juvenile Court, Morin, through his

attorney, filed an OSC for child support in July 1999 in his paternity proceeding. He continued the OSC two times. On February 9, 2000, Comm. Zakon entered a default order of child support against D. Elwood with no proof of service in the court file based on income D. Elwood had never earned in her life. Because she knew nothing about the OSC and had rightfully assumed that only Juvenile Court had jurisdiction over her, Morin, and her children, she never filed a response and she never appeared in Comm. Zakon's court.

D. Elwood filed a civil rights action against Morin, the social workers involved in her juvenile court action, Los Angeles County, and other defendants. ***Elwood v. Morin, et al.,*** Case No. CV 01-8582 LGB, Central District of CA. The case was in the Ninth Circuit, which court affirmed the dismissal of the action. Case No. 02-56918. Simultaneously with this petition, D. Elwood has filed a Petition for Writ of Certiorari in that case.

In March 2001, one month after D. Elwood served Morin, the County of LA, and the social workers with the federal complaint, Morin and the County opened up a civil Child Support Enforcement Action ("CSEA") enforcement action in LA Superior Court concerning the default child support order. Up to this point, which was 13 months after the order was entered and 20 months after Morin had filed his OSC for child support in the paternity action pending before Comm. Zakon, D. Elwood knew nothing about the order.

She filed a Motion to Vacate the Order in May 2001. Judge MacLaughlin, Los Angeles Superior Court, tried to make her appear before Comm. Zakon, although he is only a family law Commissioner. LA Superior Court admitted that Comm. Zakon is not a trained CSEA Commissioner.

Therefore under federal and state law he cannot hear CSEA proceedings.

D. Elwood took the motion off calendar and challenged Comm. Zakon and Judge MacLaughlin in federal court, alleging that the former was without subject matter jurisdiction to assign the CSEA enforcement action to Comm. Zakon and that the latter was without authority to accept such assignment based on federal and state statute, CA Rules of Court, and LA Superior Court Local Rules.

Morin and the County then initiated a criminal prosecution against D. Elwood for contempt and nonsupport of her children. CSEA Commissioner Ladner suggested that D. Elwood's attorney refile the motion to vacate with him, and she did. Roberta Lee, another CSEA Commissioner took Comm. Ladner's place, because he retired. Comm. Lee set aside the order on November 12, 2003, almost four years after the order was entered (February 14, 2000) and almost three years after D. Elwood began her legal battle to vacate the default order.

D. Elwood alleged a detailed account of domestic violence and harassment by Morin in her declaration in support of her OSC filed March 30, 1999, to be heard on April 20, 1999 filed Morin's paternity action. Comm. Zakon voiced no concern for these allegations although there are numerous family code statutes addressing the manner in which to proceed when allegations of domestic violence are made.

As already indicated, on April 20, 1999, Comm. Zakon made Judith Wells, D. Elwood's attorney, go into his chambers to litigate the child custody issue in violation of D. Elwood's constitutional right to an open hearing in court with a reporter taking down the proceedings.

Mr. Kotler, Mr. Morin's attorney, found this to his liking because he could argue facts (falsely) of which Ms. Wells did not know. Further, D. Elwood and the children had everything to lose and Morin, everything to gain. Ms. Wells did not demand a hearing in open court or that her client be present in chambers. She also did not seek a break so that she could consult with Ms. Elwood on whether Mr. Morin lived close by or not. Thus, Mr. Morin obtained a stipulated joint physical and legal custody order based on false information provided by Mr. Kotler which D. Elwood's attorney did not challenge because she did not know the information was false.

When D. Elwood's attorney, [this writer] appeared on June 7, 2001, on Motion to Transfer, Comm. Zakon once more demanded that the hearing take place behind closed doors. Ms. Barry stood her ground and requested that the hearing be on the record in open court. When he realized he could not conduct the hearing without it being on the record, he took the bench. Comm. Zakon did not know what the motion was which was on calendar. Barry told him and he could not find it in the file. Barry had to find it for him. He looked at the motion maybe a minute, did not look for Kotler's opposition (which was not in the file although he did file it) or for Barry's Reply (in the file), and ruled that Barry had not shown good cause.

Comm. Zakon could not have ruled that quickly because Barry cited Local Rule 2 (transfers) which is complicated because judicial districts are determined by zip codes. Barry also referred to two or three zip codes.

Morin notified Comm. Zakon in July 1999 that the children were the subject of a Juvenile court case. Comm. Zakon appeared to be unaware of CA Welf. & Inst. C. Sec.304 which gives only juvenile court jurisdiction to rule on

custody and the case law holding that only Juvenile Court had authority to rule on custody AND support while a juvenile court case is pending. He proceeded with Morin's OSC on support although Juvenile Court had jurisdiction over the children and the parents, there was no proof of service of the OSC for child support ever filed with the Court, the notices continuing the OSC re: child support were ambiguous since it appeared that Comm. Zakon was also continuing the parties' OSC's for child custody at the same time, Comm. Zakon did not require Morin to amend his Petition to include a request for child support although under California law, Comm. Zakon could not award relief not prayed for in the petition in a default proceeding, he expressed no concern over whether D. Elwood had received notice of the hearing, although her attorney had substituted out and D. Elwood was proceeding in propria persona, and Comm. Zakon did not contact Juvenile Court to find out whether the order of child support would interfere with D. Elwood's reunification plan set up by the social workers in Juvenile Court.

Further, an examination of the court docket for both Morin's paternity and the Juvenile Court proceedings show that when D. Elwood had notice of hearings and proceedings, she never missed a hearing, did not sit on her rights, and took all necessary legal steps to protect her and her children's due process rights.

On August 26, 2003, D. Elwood filed a Verified Statement of Disqualification of Comm'r Zakon. On September 4, 2003, Comm'r Zakon struck the petition and refused to disqualify himself. He also filed an Answer. On September 15, 2003, D. Elwood filed a timely Petition for Writ of Mandate from Comm. Zakon's order striking the Statement of Disqualification. On September 25, 2003, the Court of Appeal denied the petition without providing an

opinion. On October 5, 2003, D. Elwood filed a timely Petition for Review. On November 19, 2003, the California Supreme Court denied discretionary review without providing an opinion. See Appendices A, B, C at pp. 1a-9a.

D. ELWOOD HAS A FEDERAL AND STATE CONSTITUTIONAL RIGHT TO A FAIR, UNBIASED JUDGE AND ONE WHO WAS NOT A WITNESS OR PARTY TO THE LAWSUIT.

This Court has ruled that litigants, like D. Elwood, have an

> ...undisputed interest in a fair trial, which includes the right to have an unbiased judge. See *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927) ("it certainly violates the Fourth Amendment, and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case") [Citations.]

In *Johnson v. Mississippi*, 403 U.S. 216, *supra,* this Court ordered a contempt hearing before a judge other than the judge who cited Mr. Johnson for contempt. The principal reason for the judge's disqualification was because he was a defendant in a federal civil rights suit brought by Mr. Johnson and others:

> We mention this latter point because our remand will entail a hearing before another judge. In concluding that Judge Perry should have recused himself, we do not rely solely on the affidavits filed by the lawyers reciting intemperate remarks of Judge Perry

> concerning civil rights litigants. **Beyond all that was the fact that Judge Perry immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that. From that it is plain that he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit**. Trial before "an unbiased judge" is essential to due process. *Bloom v. Illinois*, 391 U.S. 194, 205; *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465, emphasis added.

See also, Hall v. Harker (1999) 69 Cal.App.4th 836:

> "Whatever disagreement there may be in our jurisprudence as to the scope of the phrase 'due process of law,' there is no dispute that it minimally contemplates the opportunity to be fully and fairly heard before an impartial decisionmaker." (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 245 [42 Cal.Rptr.2d 440].)

D. Elwood also has "an interest, as [] citizens] in commenting upon matters of public concern. [Citations.]." *Richey, supra.*

> The potential bias of a judge is clearly a matter of public concern. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835-37, 98 S.Ct. 1535, 1539-40, 56 L.Ed.2d 1 (1978). There, the Virginian Pilot, a Landmark newspaper, published an article about a pending investigation of a state judge by the Virginia Judicial Inquiry and Review Commission. The article identified the state judge under investigation. Landmark was subsequently indicted, convicted, and fined for the article, as the

> identification of a judge under investigation was a violation of Virginia state law. The Supreme Court reversed the conviction. "Whatever differences may exist about interpretations of the First Amendment," the Court observed, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." [Citations]. This includes the operation of the courts and judicial conduct of judges; indeed, such topics are "matters of utmost public concern." Id. at 839, 98 S.Ct. at 1541-42.3 There can be no doubt that, in the case at hand, the public would be concerned about any potential judicial bias, and thus the topic was one in which Richey had a cognizable interest in discussing. *-Richey, supra.*

We contend that D. Elwood and her children will never have a fair hearing before Comm. Zakon because of the federal lawsuit she filed against him, because of seeking to disqualify him, and because of setting aside the default order of child support which reflected negatively on his competency as a jurist.

Thus, there is an obvious reason why Comm. Zakon would want to retaliate against D. Elwood and continue to rule in favor of Mr. Morin despite the law and the facts being on the side of D. Elwood. Even more so because he was a defendant/appellee in the federal lawsuit concerning the issue of child support in favor of Mr. Morin and against D. Elwood.

As already stated, D. Elwood has a federal and state constitutional right under the Due Process Clause of the Fourteenth Amendment and Code of Civ. Proced. Sec.170.1 to a judge who is not involved in the lawsuit as a party or

witness him/herself. "The principle that no one should be a judge in his or her own cause has been recognized by the Supreme Court for well over a century." (Klein, Daniel A., Annotation: Due Process Clause of Fourteenth Amendment as Requiring Disqualification of State or Local Judge from Participation in Particular Litigation—Supreme Court Cases, 89 L.Ed.2d 1066.)

> "A fair trial, as required by due process, requires not only an absence of actual bias on the part of the judge, but also that no man [sic] be a judge in his own case or try cases *where he has an interest in the outcome*." *In Re Murchison, et al*,.349 U.S. 133 (1955), emphasis added.

As the U. S. Supreme Court stated in *Aetna Life Ins. Co. v. Lavoi* (1986) 475 US 813, 89 L Ed 2d 823, 106 S Ct. 1580:

> By section 170 of the Code of Civil Procedure it is provided that no justice, judge, or justice of the peace shall sit or act in any action or proceeding to which he is a party, or in which he is interested. This is but an expression of the ancient maxim that no man ought to be a judge in his own cause, a maxim which appeals with such force to one's sense of justice that it is said by Lord Coke to be a natural right so inflexible that an act of parliament seeking to subvert it would be declared void. (Coke on Littleton, sec. 212.) It is a principle which finds expression in the constitutions of many of our states, which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy. For it is not enough that a

> judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired." (Meyers v. San Diego (1898) 121 Cal. 102, 104, 53 P. 434, 434.) Emphasis in original

He will be inclined to deny change of custody to D. Elwood so that Mr. Morin can continue to prosecute D. Elwood for nonsupport. His decisions will be affected by what he believes the outcome of those decisions would have on the federal lawsuit against him, and the interests of the children will be subordinated to his own interests.

D. ELWOOD IS ENTITLED TO AUTOMATIC RECUSAL BECAUSE COMM. ZAKON WAS A PARTY TO THE FEDERAL LAWSUIT WHICH ARISES OUT OF THE FACTS OF THIS LAWSUIT.

Ca Code of Civil Procedure Sec. 170.1(a)(1) indicates that recusal is necessary when the judge or commissioner has knowledge of disputed evidentiary facts concerning the case because he or she is or most likely would be a witness in the action. Sec.170.1(a)(4) indicates that recusal is necessary if the judge is a party to the action. Comm. Zakon was a defendant in D. Elwood's federal lawsuit, *Elwood v. Drescher*, Case No. 02-56917, Ninth Circuit. Further, Comm. Zakon is aware of evidentiary facts affecting the child support issue, and he has repeatedly favored the father and his attorney resulting in violations of D. Elwood's and her children's constitutional rights.

On the grounds of Sec.170.1(a)(1) and (a)(4), Comm. Zakon must recuse himself from this case.

COMM. ZAKON IGNORED THE ALLEGATIONS OF DOMESTIC VIOLENCE D. ELWOOD MADE IN HER DECLARATION IN SUPPORT OF HER OSC RE: CHILD CUSTODY, AND MADE THE ATTORNEYS APPEAR IN CHAMBERS WITHOUT THEIR CLIENTS OR COURT REPORTER CONCERNING THE TEMPORARY ORDER OF CHILD CUSTODY.

From the very first time Comm. Zakon entered an order, he has engaged in a pattern of constitutional abuses against D. Elwood which resulted, initially, in Morin obtaining joint physical custody without an evidentiary hearing on the record despite D. Elwood's allegations of domestic violence and despite the fact that Morin barely knew his children. Custody of the children was changed in chambers with no court reporter or their mother present. D. Elwood and her children had everything to lose, and they were not present when this order was made. At the very least, Comm. Zakon should have required an evidentiary hearing and restricted Morin's contact with the children until the domestic violence allegations could be resolved. Instead, Comm. Zakon awarded shared physical custody of children to a virtual stranger whose mother said he had been violent towards their siblings and her.

As indicated above, he had tried a second time to force D. Elwood's attorney into chambers, but because the proceeding was a noticed motion, Ms. Barry, D. Elwood's attorney, stood her ground and Comm. Zakon reluctantly heard and denied the motion in court with a reporter taking down the proceedings.

The fact that the default order of child support he entered against D. Elwood was set aside by another LA Superior

Court Commissioner is also a reflection on his competency which also makes it likely that he cannot be fair with D. Elwood in ruling on permanent custodial arrangements.

REASONS FOR GRANTING CERTIORARI

The state of the nation's family and juvenile courts is disgraceful. Battered women and their children turn to court for protection and routinely, these mothers lose custody, and the children are given over to their abusing parents. Social workers also ignore allegations of domestic violence and hand children over to abusive parents or other abusive family members.

On January 29, 2004, at the Fourth Annual Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law, Roxanne Barton Conlin, the renowned women's rights attorney who delivered the lecture, commented during her lecture about this phenomenon of courts handing children over to their abusers despite the overwhelming support of the American people to eradicate domestic violence and the states' Legislatures enactment of numerous statutes outlawing domestic violence and requiring judges to consider domestic violence as a detriment to children when awarding custody.

The California Legislature acknowledges that Courts are slow to protect women who are victims of domestic violence, stating

> WHEREAS, Domestic violence is a serious and widespread problem, recognition of which has grown in recent years; and
>
> WHEREAS, Statistics regarding family violence are sobering. For example, in the United States, a woman

is physically assaulted in her home every 15 seconds; and

WHEREAS, Our criminal justice system has been slow to respond to the victims of domestic violence. According to police department data, arrests are made in only 5 percent of domestic disturbance calls in Los Angeles County. Other research indicates that many battered women who kill their abusers previously have attempted, without success, to protect themselves or their children in other ways from battery, and later they are held to an unreasonable standard of justification when they try to assert their right to self-defense in court;....

Amendment to Section 8 of Article V of the California Constitution.

After significant research, CA NOW found that

the present family court system in California to be crippled, incompetent, and corrupt. The bias in the system results in pathologizing, punishing, and discriminating against women. The system leaves decisions which should be made on facts in a courtroom to extrajudicial public and private personnel. The system precludes the parties, particularly the mother, from her rights to due process, including a trial, long cause hearing, or adjudication, to which she is entitled, much less an appeal of these decisions. Mothers are coerced into stipulations through the rubber stamping of definitive evaluations and reports which become the court's ruling...***In the most egregious cases, perfectly fit mothers who were the primary caretakers of their***

> ***children loose [sic] custody to the fathers who are motivated by evading support obligations, and are often known abusers.*** In response to this crisis the CA NOW Family Taskforce has proposed a Legislative, Judicial, Executive and Grassroots strategies to reform the Family Law Courts. **–Report Summary, CA NOW Family Court Report 2002, p.3, emphasis in original.**

Wellesley College Center for Women sponsored The Battered Mothers Testimony Project: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts showing how battering fathers use the legal system as a weapon against mothers attempting to escape their violence. The report documents routine violation of human and constitutional rights of battered women and abused children in the Massachusetts courts.

There are numerous other studies and reports which back up this claim. For example, in "Expose: The Failure of Family Courts to Protect Children from Abuse in Custody Disputes" published by Our Children, Our Future Charitable Foundation (St. Charles and Crook, Editors, 2000), Richard Ducote, Attorney, who represents women throughout the nation who have taken their children into hiding when the system fails them and has been instrumental in getting legislation in Louisiana enacted into law protecting victims of domestic violence contributed an article to the book in which he states:

> After twenty years in family law courtrooms throughout the country, I confidently say that no woman, despite very abundant evidence that her child has been sexually molested by her ex-husband or that she has been repeatedly pummeled by the violent

> father of her child, can safely walk into any family court in the country and not face a grave risk of losing custody to the abuser for the sole reason that she dared to present the evidence to the judge and ask that the child be protected. Id. at 11.

In the forward in "Expose" by Judge Sol Gothard, a Louisiana appellate justice, Judge Gothard states:

> I fervently hope that this work will help educate all who make and implement the law in the area of child custody to simply be fair and impartial in cases that impact the future of our children. Id. at 1.

Nannette Sachs, Amicus for Domestic Justice, Brooklyn, New York at p.143, Id. states in her article, "The Courts as Persecutors of Child-Victims of Incest":

> ...Protective parents have an entirely opposite set of values and outlook that does not stand up well to the combativeness of a trial. The vast majority of custody decisions I have witnessed in fourteen years as an advocate have gone against what I believe any reasonable person would judge to be the best interests of the child.

In Professor Geraldine Butts Stahly's article at p.127(Professor at Cal St San Bernardino and nationally-recognized expert in the area of domestic violence), she indicates that a study of 150 randomly-selected marital dissolution cases filed in a Southern CA courthouse "...supported the role of control and misogyny issues in custodial challenges by battering men." Further, she states that "...a number of anecdotal cases suggest that long-term persistence by the batterer in pursuing and harassing the

woman using legal as well as extralegal means may ultimately result in custody being awarded to the batterer. (American Psychological Association, 1996)." p.127.

In Karen Winner's Report entitled "Judge Michael Dufficy, Comm'r Sylvia Shapiro, and Court-Appointees in Marin County's Superior Court in CA" (The Justice Seekers, Inc. 2000), Ms. Winner states in "Note from the Author":

> The following report was commissioned by a group of families and concerned citizens as an important step towards understanding the problems that exist in Marin County Superior Court in family law cases. This author, Karen Winner, investigated the conduct of Judge Dufficy, Commissioner Shapiro, and some of their appointees, and found evidence of serious wrongdoing. p.2, Id.

Ms. Winner drew the following conclusions based on cases filed between the mid-1990's and 2000 that J. Dufficy and Comm'r Shapiro engaged in "...a range of probable misconduct including:

- Diverting child support and maintenance (alimony) payments from children and needy spouses to cronies [attorneys, as their fees];

- Showing gross favoritism toward certain litigants and lawyers;

- Ignoring litigants' rights and procedures under the law;

- Accepting tainted, skewed psychological evaluations into evidence that results in the wrong

parent being awarded custody of the child;

- Violating the Judicial Code of Ethics;

- Approving fee-gouging by experts and court-appointees;

- Keeping financial and business dealings with lawyers hidden (Judge Duffiey);

- Showing disrespect for litigants; lacking proper judicial demeanor (Commissioner Shapiro). Id., p.6

In the New York Court study funded by the U. S. Dept of Justice and Natl Institute of Justice entitled "Domestic Violence, Visitation and Custody Decisions in New York Family Courts (O'Sullivan, May 2002), the report at p.41 shows that based on a sample of cases in Westchester Family Court that mothers were significantly more likely to receive a custody order than fathers.

> The one significant relationship found involved protection orders granted between 1995 and 1998: fathers who were enjoined by or had an OP against them by the mother during the three year period **were more likely to receive a visitation order than fathers in cases in which no family offense petition was ever filed.** Id. emphasis added.

Because of this finding and the fact that so many family offense petitions were dismissed or withdrawn, there were interviews of attorneys representing the battered women to find out "...what was happening behind the numbers." Id. One lawyer stated, "...batterers are retaliating against victims

who file criminal charges by seeking protection orders in family court: about 30% of her clients are the respondent in family court family offense, custody and visitation cases." Id. at 43.

The lawyers also generally encourage the mothers to tell the judge that the child should have a relationship with the father so that the mother does not appear to be vindictive towards the father [apparently, even if it is not in the interests of the children]. Most batterers want to see their children. However, most of the interviewed lawyers believed it was to assert their rights, not because they were genuinely attached to their children. Id. at 44.

> Fathers rights groups are actively lobbying. Sometimes the fathers file for custody in retaliation against support orders or arrest. Family court is used to harass the victim, to keep her coming to court. Some fathers apply for visitation orders but do not exercise their visitation rights. The cases take on a life of their own. ... Id.

The lawyers stated that they almost never ask that the father be denied visitation because "Many judges respond punitively to such a request. In one court, to ask for no visitation at all 'is to incur incredible wrath.'" Id at 45. The fear of loss of custody if the judge rules that the mother did not prove violence "...was a recurrent theme that inhibits requests to deny visitation." Id.

Further, the courts rarely consider risk to the mother as a risk to the children "...on the grounds that her ability to care for the child will be compromised." Id. at 46. The judges often appear calloused towards women when they described their injuries or what the batterer did to them. In one case

when the woman described an attack against her with a hammer, all the judge did was to suggest counseling for her, said nothing to the man for his criminal misconduct, and did not limit his parental rights to limit access to the mother. Id. at 47.

Another judge refused to limit visitation after the mother testified that the father smashed her face against a glass wall during court-ordered transfer of the child whom the father also verbally abused and scratched since there had been several uneventful visits after the occurrence of the violent incident. Id. at 48.

Lawyers interviewed for the study indicated that they saw a surge in battered women being charged with failure to protect at the rate of a couple of cases per month. Id. at 52.

This ties in with Judge Weinstein's 188+ page ruling in *Nicholson v. Williams*, Case No. 00-CV-2229 (E.D.N.Y. 2002) in which he states:

> The evidence reveals widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts, through forced unnecessary separation of the mothers from their children on the excuse that this sundering is necessary to protect the children. P.9, slip opin., Id.

Judge Weinstein relied on, and gave particular weight to, findings of National Council of Juvenile & Family Court Judges Family Violence Department as set out in a comprehensive 1999 report entitled *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice* ("Nat'l Council Guidelines"). Id at 79.

The Nat'l Council Guidelines suggest that child welfare services blame victimized mothers for "failure to protect". Id. The Court noted that even the City Defendants' expert witness wrote that the "'[t]he typical battered wife is hardly passive. She actively seeks to prevent further victimization and is handicapped, not by her own psychological limitations, but by the *lack of concrete and effective remedies available from agencies of social control or other institutions.'*" Id at 81, emphasis in original.

The Nat'l Council Guidelines also stated that batterers should be held accountable. The Court also found that, as here, Child Welfare would often remove children from their homes before seeking court orders. Id. at 105. Judge Segal, a judge of the N. Y. State Family Court for the City of New York for ten years until April 2001 testified that

> "...my best recollection is that there were no more than ten instances where [ACS petitioned the court for permission to remove a child before doing so.] If the City wanted custody of the children, they would seize them unilaterally and ask the court to confirm or ratify that action after the fact." Tr. 124; Exh. 147 at Id. 106.

The Court also quoted Judge Segal as stating that

> ...the Second Circuit Court of Appeals' holding in *Tenenbaum v. Williams,* 193 F.3d at 594 warning about the unconstitutionality of hair-trigger ordered removals did not cause "any perceptible change" in ACS's practice of removing children without court order. [Citations.] Id. at 106.

Women's Law Project produced a report in April 2003 entitled "Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community".

The Report sets out its methodology and at pp.4-5 its findings which include the finding that "equality, fairness and integrity are undermined by the lack of assistance, due process, and time provided to litigants and the rendering of decisions that are inconsistent with applicable legal standards and difficult to enforce." Id. at 5.

The findings also included one that Domestic Relations Division relative to the Civil Division of the Common Please Court, for example, suffered from lack of certainty, orderliness, and regularity in proceedings. Because most of the litigants were women, members of racial minorities, and low income persons, the report suggests bias may be a factor contributing to the inadequacies in the Domestic Relations Division. Id. at 72.

Thus, mothers who are victims of domestic violence often suffer discrimination in the courts, those who protest gender discrimination against mothers or corruption in Family and Juvenile Courts suffer judicial reprisal, including the loss of their children, and Family and Juvenile Courts or their personnel receive substantial federal funding and repeatedly fail to meet federal standards to keep those funds. It will take this Honorable Court to restore constitutionality (and sanity) to Family and Juvenile Court proceedings, where domestic violence and/or child abuse is alleged.

Without this Court's intervention, D. Elwood and her children will suffer irreparable harm. This Court has never forgotten women who work outside the home and ruled, for example, that sexual harassment is illegal in the workplace.

We ask the Court to remember mothers, especially those mothers who are trying to escape a life of domestic violence for themselves and their children by turning to courts for protection only to have the courts turn over custody to the abusers.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be granted.

DATED: February 17, 2004

Respectfully submitted,

Patricia J. Barry
Counsel of Record

Attorney for Petitioner

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

S119715

[Filed November 19, 2003]

DARLA ELWOOD,
Petitioner,

v.

SUPERIOR COURT
LOS ANGELES COUNTY,
Respondent;

Joseph Morin,
Real Party in Interest.

On Appeal From
Court of Appeal, Second District, Division Seven
No. B169966

En Banc

Request for judicial notice denied.

Petition for review DENIED.

/s/ _____
Frederick F. Ohtrich
Clerk

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT COURT OF APPEAL DIVISION SEVEN

B169966

[FILED SEP 25 2003]

JOSEPH A LANE Clerk
R. McCLINTOCK Deputy Clerk

DARLA ELWOOD,
Petitioner,

v.
(Temporary Judge)
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent

JOSEPH MORIN,
Real Party in Interest

On Appeal From Super. Ct No. PF001184
Robert W. Zakon

ORDER

THE COURT*:

The court has read and considered the petition for writ of mandate filed herein September 15,2003. The petition is denied.

/s/_____	/s/_____	/s/_____
*PERLUSS, P.J., (Assigned)	JOHNSON, J.,	MUNOZ, J.

APPENDIX C

Los Angeles Superior Court
Sep 04 2003
JOHN A. CLARKE, CLERK
BY C. BUSHNELL, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CASE NO. PF1184

JOSEPH MORIN,)
Petitioner,)
v.)
)
DARLA ELWOOD,)
Respondent.)
)

Order Striking Statement of Disqualification

On August 26 2003, Respondent DARLA ELWOOD filed a document entitled " VERIFIED STATEMENT OF DISQUALIFICATION OF COMMISSIONER ROBERT ZAKON MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST TO TAKE JUDICIAL NOTICE; EXHS 1-5" seeking to disqualify Commissioner Robert W. Zakon from further hearings in the above-captioned matter. The document is treated as a statement of

disqualification for cause filed pursuant of Code of Civil Procedure section 170.1 and 170.3.

Code of Civil Procedure §170.3(c) (1) requires that this disqualification statement set forth "the facts constituting the grounds" for disqualification of the judge. Mere conclusions of the pleader are insufficient. *In re Morelli* (1970) 11 Cal.App.3d. 819,843; Urias v. Harris Farms, Inc. (1990) 234 Cal.App.3d 415,426.

A party's belief as to a Judge's bias and prejudice is irrelevant and not controlling in a motion to disqualify for cause, as the test applied is an objective one. *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; *Stanford University v. Superior Court* (1985) 173 Cal.App.3d 403, 408 ("the litigants' necessarily partisan views do not provide the applicable frame of reference").

Code of Civil Procedure section 170.2 of the Code of Civil Procedure specifically states that the statements made by a judge expressing a view on legal or factual issues presented in the proceedings are not grounds of disqualification. This is the same as the federal rule: "A judge's views on legal issues may not serve as the basis for motions to disqualify." *United States v. Conforte*, 624 F.2d 869, 882 (9th Cir. 1980); *see also, United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996).

Rulings and findings based upon evidence and argument officially presented can almost never constitute a valid basis for disqualification. *McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11 (erroneous rulings, even when numerous and continuous, are not grounds for bias or prejudice, nor are "judges' expressions of opinion uttered in what he conceives to be the discharge of his judicial duty").

See also, California Procedure, 3rd Ed., Witkin, *Courts*, §94, pp. 111-112. A party's remedy for an erroneous ruling is not a motion to disqualify, but rather review by appeal or writ. The reasoning in support of this rule is clear. To allow otherwise would be to allow litigants to circumvent the established appellate process and engage in collateral attacks on judicial rulings by means of the disqualification process.

As stated in *Liteky v. United States* (1994) 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474, in discussing the extrajudicial source doctrine:

> "First judicial rulings alone almost never constitute valid basis for a bias or partiality motion. *See United States v. Grinnel Corp.*, 384 U.S. 563 (1966). In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties of their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism

> or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22 (1921), a World War I espionage case against German-American defendants: 'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans because their 'hearts are reeking with disloyalty.' *Id.*, at 28. *Not* established bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as...judges, sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune."

Respondent's statement of disqualification discloses no legal grounds to support disqualification and is ordered stricken pursuant to Code of Civil Procedure §170.4, subdivision (b). Respondent is reminded that this determination on the disqualification is not an appealable order and may be reviewed only by a writ of mandate from the Court of Appeal sought within 10 days of notice to the parties of the decision. In the event that a timely writ is sought and an appellate court determines that an answer should have been timely filed, such an answer is filed herewith.

GOOD CAUSE APPEARING THEREFORE, It is so ordered.

Date: 9/4/03

ROBERT W. ZAKON
Commissioner of the Supreme Court of California County of Los Angeles

Verified Answer of Court Commissioner

I, Robert W. Zakon, do declare under penalty of perjury:

1. I am a Commissioner of the Superior Court and as such am assigned to preside over this case

2. I am not prejudiced or biased against or in favor of any party to this proceeding or their counsel.

3. All rulings made by me in the have been based upon facts and arguments officially presented to me and upon my understanding of the law. My statements and rulings are set forth in the records and the files herein, which are the best evidence hereof. To the extent the moving party's statement of those rulings and statements are inconsistent therewith, they are denied.

4. All statements made by me all actions taken by me in this proceeding have been done in furtherance of what I believe were my judicial duties.

5. I am aware of no grounds upon which I must recuse myself from hearing this matter.

Executed this 4th day of SEPT., 2003 at San Fernando, California.

ROBERT W. ZAKON
FILED: LOS ANGELES
SUPERIOR COURT,
SEP 04 2004
JOHN A. CLARKE, CLERK
S/S
BY C. BUSHNELL, DEPUTY

APPENDIX D

Cal Code Civ Proc § 170.1

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2004 REG. SESS. CH.29, 4/1/04
2003-04 3RD EXTRA. SESS., CH.1 AND 5TH EXTRA. SESS., CH.2

CODE OF CIVIL PROCEDURE
PART 1. Courts of Justice
TITLE 2. Judicial Officers
CHAPTER 3. Disqualification of Judges

Cal Code Civ Proc § 170.1 (2004)

§ 170.1. Grounds for disqualification

(a) A judge shall be disqualified if any one or more of the following is true:

(1) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding.

(2) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding.

A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

(A) A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law; or

(B) A lawyer in the proceeding was associated in the private practice of law with the judge.

A judge who served as a lawyer for or officer of a public agency which is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

(3) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding. A judge shall be deemed to have a financial interest within the meaning of this paragraph if:

(A) A spouse or minor child living in the household has a financial interest; or

(B) The judge or the spouse of the judge is a fiduciary who has a financial interest.

A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

(6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

(7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding.

(8) The judge has a current arrangement concerning prospective employment or other compensated service as a

dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding such prospective employment or service, and either of the following applies:

(A) The arrangement is, or the discussion was, with a party to the proceeding.

(B) The matter before the judge includes issues relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution neutral.

For purposes of this paragraph, "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.

For purposes of this paragraph, a "dispute resolution neutral" means an arbitrator, mediator, temporary judge appointed under Section 21 of Article VI of the California Constitution, referee appointed under Section 638 or 639, special master, neutral evaluator, settlement officer, or settlement facilitator.

(b) A judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.

(c) At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.